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No. 261

In the Supreme Court of the United States

OCTOBER TERM, 1958

AMERICAN NATIONAL BANK OF JACKSONVILLE,
PETITIONER,

v.

UNITED STATES OF AMERICA AND TITLE & TRUST COMPANY OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 30-39) is reported at 255 F. 2d 504. The findings of fact and conclusions of law of the District Court (Pet. 19-29) are not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1958. (Pet. 30.) A timely petition for rehearing was denied on June 26, 1958. (R. 176.) The petition for certiorari was filed on August 7, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, under Florida law, a so-called "dragnet clause" of a mortgage given by husband and wife, tenants by the entireties, is to be construed as securing obligations of the husband alone, arising out of his obligations as a partner or as an endorser.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such a person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, 882]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

> (a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—
>
> * * * * * *

26 U.S.C. 1952 ed., Sec. 3672(a)).

STATEMENT

The facts, as set out in the agreed statement (R. 1-10), may be summarized as follows:

This suit was brought by the American National Bank of Jacksonville, Florida (hereinafter referred to as the bank), to foreclose a mortgage from C. Albert Kimbel (hereinafter referred to as the taxpayer) and his wife Ida T. Kimbel. The mortgage was dated June 17, 1953, and recorded on June 18, 1953. In addition to taxpayer, several parties claiming liens against properties in his name, including the United States, were made parties defendant. (R. 1-2.)

The mortgage was given to secure a primary note in the face amount of $24,000, and covered property held by the spouses as an estate by the entireties. (R. 5, 11-14.) After removal of the cause to the District Court, that court, pursuant to stipulation by the bank and the United States, entered its summary decree of foreclosure, adjudging that the bank had a lien to secure a total due on this note of $28,515.13, representing the balance due on the principal, taxes advanced, interest on the foregoing, costs, and attorneys' fees. The question of priority of this lien against the United States, claiming liens for taxes in the amount of $12,200.23, was reserved for future determination. (R. 3, 5.)

Thereafter, the property was sold for $35,000. (R. 4.) Of the amount received from the sale, $14,000 was held out, and the parties litigated over that sum (R. 4), the balance being paid to the bank (R. 6). Since the claims of the bank and of the United States far exceeded the proceeds of the sale, and the claims of all other defendants were found to be subsequent

in point of time and/or law to the former claims, no specific findings as to their interests were made. R. 6.) In the litigation over the $14,000, the Title & Trust Company of Florida, which had insured the primary mortgage indebtedness, was permitted to intervene to oppose the claim of the United States to priority over the bank's primary mortgage indebtedness. (R. 4.)

The United States based its claim on Federal Insurance Contributions Act and Federal Unemployment Tax Act taxes, which were duly assessed, and claims of lien which were duly recorded as against the taxpayer at various times between January 10, 1952, and July 23, 1954. Most of the filings of notice of lien were before June 17, 1953, the date of the mortgage. (R. 5.) Mrs. Kimbel died on December 1, 1954.

The District Court held that although notices of the majority of the Government's claims of lien were recorded prior to the time of the mortgage, they did not constitute liens upon the estate by the entireties, but did become liens on the real property on the death of Ida T. Kimbel on December 1, 1954. (R. 57.) The Court of Appeals agreed. (Pet. 33-34.)

The mortgage contained the following typed clause (Pet. 31), referred to by the court below as a "dragnet clause" (Pet. 35):

> The Mortgagors hereby agree that the lien of this mortgage shall, in addition to the note hereby secured, secure all sums of money which may now be due or may hereafter become due to the Mortgagee from the Mortgagors. This additional security provision shall remain in effect for so long as the promissory note hereby secured remains unpaid.

The question here raised is whether by this clause the mortgage covered, in addition to the principal note for $24,000, three additional items, as follows:

(1) The obligation of the taxpayer on a note to the bank dated February 15, 1953, signed "Duval Electric Co., C. A. Kimbel, Pres." (R. 23-24.) Duval Electric Company was a partnership, of which the taxpayer was a partner.

(2) The obligation of the taxpayer on a note dated February 27, 1953, of T. H. Thompson, discounted by the bank, which was payable to and endorsed by Duval Electric Co. (R. 25). This note was also endorsed by taxpayer. (R. 26.)

(3) The obligation of the taxpayer as an accommodation endorser on eleven notes of the Duval Electric Company, Inc., a corporation, to the bank, given subsequent to the execution and delivery of the mortgage. (R. 29-50.)

The District Court held that these individual obligations of the taxpayer to the bank were secured by the mortgage, holding the "dragnet clause" to be ambiguous and therefore permitting parol evidence to aid in the construction of the instrument. (R. 102-104.)

The Court of Appeals disagreed, construing the "dragnet clause" as not covering the individual obligations of the taxpayer arising out of his actions as a partner (Pet. 35-38) or out of his action as an endorser of the corporation's notes (Pet. 38). Finding no ambiguity in the language, it did not consider extrinsic evidence to ascertain its meaning. (Pet. 39.)

ARGUMENT

The question as to which review by this Court is sought is solely one of state law, involving the interpretation of a particular clause in a mortgage. It is a question on which there appears to be no direct authority from the state courts, none being cited, and as to which there is no conflict between the Court of Appeals and state decisions. The opinion of the Court of Appeals is clearly an attempt to discover what, in the absence of state decisions, is the proper interpretation of the "dragnet clause" in the Florida mortgage given by tenants by the entireties,[1] and the determination of local law therein made is such as would ordinarily be accepted by this Court. *Ragan v. Merchants Transfer Co.*, 337 U.S. 530, 534.

There is no federal question involved, nor any conflict with the decisions of this Court. Contrary to the petitioner's suggestion (Pet. 10-11), it is apparent that the Court of Appeals was not stating that a partner is not individually liable for partnership debts (cf. *Francis v. McNeal*, 228 U.S. 695). Rather, the court was concerned that a wife's interest in her residence held in tenancy by the entireties should not be put at stake, not merely by her husband's actions, but also by those of other persons, unless her intent to so risk her interest should clearly appear from the language employed.

The decisions of this Court and the Florida courts cited by the petitioner (Pet. 11-13) merely express gen-

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[1] The opinion of the Court of Appeals was written by Judge Warren L. Jones, a Florida practitioner for nearly thirty years prior to his appointment to the court. Cf. *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-708.

eral rules as to the construction of written instruments, i.e., that statutes and documents are to be interpreted as a whole, or that parol evidence may be introduced, not to vary a written instrument, but to explain it. Such general principles do not determine whether there is such ambiguity in a particular written instrument as to call for explanation, and do not govern the interpretation of a particular clause. Petitioner's contentions in this respect were brought to the attention of the Court of Appeals in its petition for rehearing, which was denied. The court did not purport to disagree with these principles. Rather, its denial of the petition for rehearing signifies that it regarded them as inapplicable in construing the particular clause involved, and that it adhered to its opinion that the clause could not, as a matter of law, be construed as covering the obligations here in question, so that there was no occasion for the consideration of parol evidence. Petitioner is merely asking this Court to take the case to construe for itself the "dragnet clause" of a particular mortgage, or at most to establish a rule of Florida property law.

Contrary to the petitioner's final contention (Pet. 13-14), it is obvious, as we have indicated above, that the court below did not disregard state law on a question of property, but was attempting to determine what the state law is and to apply it. Its action in so doing was in agreement, rather than in conflict, with the cases of *Poe* v. *Seaborn*, 282 U.S. 101, 110, and *Commissioner* v. *Stern*, 357 U.S. 39, 45. It did not purport to set out any federal rule, but, using such guides as were available in the decisions of Florida and other jurisdictions, it undertook to arrive at the correct Florida rule.

In any event, we submit that the result reached here is correct for the additional reason, not accepted by the courts below, that the federal tax lien on the interest of the taxpayer in the property held as a tenant by the entireties was prior to the lien of the mortgage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1958.

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